No. 95-1184 (216)

In The

Supreme Court of the United States

October Term, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,

Petitioner,

vs.

WILEMAN BROS. & ELLIOTT, INC., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

BRIAN C. LEIGHTON
Attorney for Amici Curiae
701 Pollasky Avenue
Clovis, California 93612
(209) 297-6190

8544
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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INTEREST OF THE AMICI

United Sheep Producers is a non-profit membership organization of sheep and wool producers. It is presently active in opposing the referendum to establish a sheep and wool promotion program similar to the program at issue in this case. Handlers Against Promoflor is an unincorporated association of handlers of cut flowers and cut greens who must pay assessments under the Fresh Cut Flowers and Fresh Cut Greens Research and Promotion Act, 7 U.S.C. § 6801, *et seq.*, and its implementing regulations. Family Farm Defenders is a coalition of organizations and individuals committed to the creation of a farmer controlled and consumer oriented dairy industry. FFD's mission statement provides in part: "Agribusiness and government agricultural policies have devastated rural America, forced the majority of small and medium-sized family farms out of business, squandered our topsoil, polluted our water, lowered food quality and encouraged the creation of huge, government-subsidized corporate farms. These policies are responsible for impoverishing rural families and contribute to accidents, crime, hunger, disease and general hopelessness. When a nation allows its land and food production to fall into the hands of a few powerful corporations, individual freedoms are soon undermined. The demise of small farms and the rural communities they support — the foundation and source of our nation's most cherished values — are emblematic of the most serious problems facing America. The Family Farm Defenders is dedicated to speaking out against all forces threatening the long-term survival of rural America and to preserving a wholesome and diverse food supply; the vital connection between land, farmers, and consumers; and our irreplaceable natural resources.

Founded in 1988, amicus U.S. Association of Importers of

Textiles and Apparel has more than 165 members involved in the textile and apparel business, including manufacturers, distributors, retailers, and related service providers such as shipping lines and customs brokers, accounting for over $44 billion in U.S. sales annually and employing more than one million American workers.

Cal-Almond, Inc., Gold Hills Nut Company, Inc., Central Valley Grower Packing, Hocker Nut Farm, Jardine Organic Ranch, Rotteveel Orchards, Frazier Nut Farms, Inc., Theron Shamgochian, Inc. dba Monte Cristo Packing Company, Beards Quality Nut Company, Amaretto Orchards and Bal Nut, Inc. are all almond handlers regulated by the Almond Marketing Order (7 C.F.R. § 981.1, *et seq.*) issued under the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601, *et seq.*, and are required under the Act and the Order to pay assessments for mandatory promotion and advertising, similar to the mandatory advertising and promotion program at issue in this case. These almond handlers are all currently challenging, and several have successfully challenged in the past, the Almond Marketing Order advertising and promotion program regulations and assessments. Cal-Almond successfully convinced the Ninth Circuit Court of Appeals to rule that the assessments for promotion and advertising violated the handlers' rights guaranteed under the First Amendment of the United States Constitution, in a case prominently cited by the Solicitor General in the case herein. *Cal-Almond, Inc., et al v. United States Department of Agriculture*, 14 F.3d 429 (9th Cir. 1993).

Bidart Bros. is currently challenging the California Apple Commission advertising and promotion assessments. John I. Haas, Inc. is currently challenging the State of Washington HopCommission advertising and promotion assessments. Duarte Nursery, Inc. is currently challenging the California Grape Rootstock Improvement Commission assessments for

grape rootstock research and the dissemination of that information. Matsui Nursery, Inc., Kohara Nursery, Inc., Figone Nursery and Fogbelt Growers are currently challenging the California Cut Flower Commission promotion and advertising assessments and program. Donald B. Mills, dba DBM Mushrooms is currently challenging the Federal Mushroom Promotion, Research and Consumer Information (7 U.S.C. § 6101, *et seq.*) assessments for advertising and promotion. David Moss, dba TJ Farms, is currently challenging the California Kiwifruit Commission assessment for promotion and advertising. Gallo Cattle Company is currently challenging the National Dairy Promotion Program (7 U.S.C. § 4501, *et seq.*) and the California Milk Advisory Board promotion and advertising program and assessments. Delano Farms is currently challenging the California Table Grape Commission's promotion and advertising program and the assessments imposed for the same.

This brief in opposition to the Solicitor General's brief is presented on behalf of the undersigned with consent of all parties. *Amici Curiae* supports Respondents.

INTRODUCTION

The First Amendment protects the information marketplace for the benefit of both speakers and listeners. *See, e.g., 44 Liquormart, Inc. v. Rhode Island Liquor Stores, Inc.*, 116 S. Ct. 1495 (1976) (rejecting paternalistic state desire to manipulate consumer choice in purchasing liquor by restricting access to information); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976) (speech for profit valuable because consumer's and society's interest in free flow of information promotes efficient allocation of resources). Speaker autonomy is protected against compelled, forbidden, and regulated speech. A debate has

arisen in the agriculture sector of our economy as to how best to promote the sale of agricultural commodities. Some believe that collective promotion of the entire industry through generic messages is best. While others believe that the promotion efforts of individual entities motivated by their own self-interest is best. Rather than staying clear of this debate and allowing the competing theories to sort themselves out in the marketplace, the government has instead been pressed by the advocates of collective advertising to enter the fray. The government has made two choices which infringe the First Amendment rights of Respondents and amici. First, the government has chosen the speaker to speak on behalf of each industry, a committee of competitors. Second, the government has expressed a critically important content-based preference for one idea (generic promotion) over another (individual brand names plus a vast array of other individual and voluntary methods of promotion). Both of these choices infringe on the speaker autonomy of Respondents and amici protected by the First Amendment.

Amici share a common belief that the program at issue in this case and the similar programs under which they are assessed violate their First Amendment rights believe (1) the government has no interest, much less a substantial, compelling or vital interest, in choosing the message or the type of message amici use to promote their products; (2) the collective advertising program does not substantially advance the government's supposed objectives; and (3) it is more restrictive than necessary because it fails to provide, *e.g.* for brand credit, refunds, or other voluntary alternatives.

ARGUMENT

I.

THE PROGRAM IS A SEVERE INFRINGEMENT ON FIRST AMENDMENT FREEDOMS.

The programs at issue here impose an extraordinary burden on Respondents First Amendment freedoms, far worse than government attempts to compel speech previously struck down by this Court. *Hurley v. Irish-American Gay Group of Boston*, 115 S. Ct. 2338 (1995) (state cannot force parade sponsor to include unit whose message it did not wish to choose or carry); *McIntyre v. Ohio Elections Comm.*, 115 S. Ct. 1511 (1995) (ad sponsor not required to disclose identity); *Riley v. National Federation of the Blind of N.C.*, 487 U.S. 781 (1988) (charities need not disclose percentage of contributions for administration and fundraising expenses); *Pacific Gas & Electric Co. v. Public Utilities Comm. of Cal.*, 475 U.S. 1 (1986) (utility cannot be forced to carry bill inserts provided by energy conservation public interest group); *Wooley v. Maynard*, 430 U.S. 705 (1977) (vehicle owner cannot be compelled to display state motto "Live Free or Die" on license plate); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (newspaper cannot be forced to publish response to allegedly libelous article); *West Virginia Bd. of Education v. Barnette*, 319 U.S. 624 (1943) (school child cannot be compelled to salute the flag); *see also, e.g., Elrod v. Burns*, 427 U.S. 347 (1976) (state cannot condition government job on support for political party).

> Indeed this general rule, that the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid, subject,

> perhaps, to the permissive law of defamation. Nor is the rule's benefit restricted to the press, being enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful. . . . [T]he Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.

Hurley, 115 S. Ct. at 2347-48 (citations omitted).

These industry collective advertising programs are a direct substantial content-based attack on the First Amendment rights of Respondents and amici. The most obvious infringement is the cost. The speech tax on Respondent Gerawan is over $600,000 per year. The tax on amicus Gallo Cattle Company is several hundred thousand dollars per year. The tax on the sheep producer members of United Sheep producers and on the dairy farmer members of Family Farm Defenders often amounts to half of their net revenue. The marketing and promotion efforts of these entities are suffering because those on whom the speech tax is imposed are not typically able to pass it forward or backward. They must either forego their own marketing and promotion plans and/or engage in costly counter speech in an effort to distinguish their "brand" or product or unique combination of services in the marketplace.

There is almost an infinite variety of attributes that distinguish a particular firm's product and/or service combination in the market. A brief list would include timing of sale (early or late nectarines), variety and grade of product (roses, carnations, orchids, bouquets), marketing channel (mass market, Internet, personal selling, etc.), target audience (organic, health conscious, youth, aged, yuppies), geographic region (local or national), added value services (in-store merchandising, wedding counseling, design), marketing strategy (rapid growth, retention of loyal customers, concentration on new markets), and image identification (nostalgia, hip, quality, value). Forced reliance on a collective advertising tends to "dumb down" and make mediocre the rich diversity in an unfettered marketplace.

It is important to briefly note that these collective promotion programs are not government speech. The Solicitor General has specifically disavowed this claim, Pet. Br. at 25 n. 16, but his amici advance the argument anyway. The only government role is ministerial approval, coercion, and enforcement. The content of the programs is designed, administered, and implemented by the industry committees of competitors. USDA's Dairy Division Director recently described USDA's limited role as follows:

> AMS strictly enforces the prohibition on the use of checkoff dollars to influence legislative or governmental policy or actions. Another oversight area deals with program content and strategies. We have received comments condemning and praising particular promotion programs. It is the policy of AMS in carrying out our oversight responsibilities to ensure that research and promotion boards satisfy all legislative, regulatory, and Department

> policy requirements. *It is the responsibility of the boards to select program strategies and so long as the Board stays within the confines of the Act and the Order, it is not the Department's policy to substitute its judgment for the judgment of the Board.*

Statement of Richard M. McKee, Director, Dairy Division, Agricultural Marketing Service, USDA, before the Committee on Agriculture, Subcommittee on Livestock, Dairy and Poultry, U.S. House of Representatives, July 26, 1996 (emphasis added). AMS's Deputy Administrator described USDA's role as follows:

> [W]e view these programs as industry, self-help measures and largely have limited our oversight to: (1) assuring that funds are expended only for activities authorized by statute; (2) maintaining proper program administration; (3) ensuring that these programs conform to USDA policies and other relevant federal laws.

Clayton, "Issues Facing Domestic Commodity Research and Promotion Programs," at 4-5, in W. Armbruster and L. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation, 1993). Finally, counsel for the Solicitor General's amicus has described the self-help programs as follows:

> Most federal statutes for promotion programs, as they are written today, include, within the purposes section of the legislation, a specific statement as to need. Therefore, the proponents of the program no longer are required to present an argument to the USDA relating to the need for the program. . . . Another milepost has been the legal acceptance of the no refund policy advanced by proponents ofresearch and promotion programs. They argue that refunds of assessments to dissidents, and to others who may assume a dissident role even though they support the results of the program, should be prohibited because such producers are merely freeloaders on successful research and market promotions paid for by others. All should carry their fair share. . . . These promotion programs are commercial in nature. They are developed and funded by an industry to promote their products. *As we learned in the Frame case, this is commercial speech, not government speech.*

Watkinson and McLeod, "Legal Concerns Facing Commodity Promotion Programs," at 20, 26, in W. Armbruster and L. Lenz (eds.), *Commodity Promotion Policy in a Global Economy* (Farm Foundation, 1993). As this Court recognized in *Keller*, 496 U.S. at 12-13, these programs are not government speech because they are paid for by a small defined group and designed and implemented by the leadership of that group.

II.

THE GOVERNMENT HAS NO INTEREST IN INFLUENCING CONSUMERS' CHOICES OR INTERFERING WITH SPEAKER AUTONOMY.

The government's justification for this program is at best vague and illusory, and at worst, diabolical. To ensure the proper respect for First Amendment freedoms, this Court has

required the government to precisely specify the interest allegedly served by the restriction on speech, and has carefully scrutinized legislative findings for substantial evidence. *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1505 (1995); *Turner Broadcasting Systems, Inc. v. FCC*, 114 S. Ct. 2445 (1994); *Edenfield v. Fane*, 113 S. Ct. 1792, 1798 (1993); *City of Cincinnati v. Discovery Network, Inc*, 113 S. Ct. 1505 (1993). Assuming, *arguendo*, that speech can be compelled to combat fraud, or address health or safety concerns, no such purpose is apparent here. As the Court said in *Hurley*:

> While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.

115 S. Ct. at 2350.

The government has variously described its interest in the program at issue as restoring order to disrupted markets, generally improving the economic well-being of producers, and, finally, expanding the market for the commodity, increasing demand, and increasing the size of the industry. But, completely lacking in the record is any showing that a problem exists. There is no analysis of the economic status of the fruit growers before or during the program. There is no analysis of supply and price variability, and therefore no conclusion as to whether the market is orderly or disorderly. USDA has not claimed that these fruit industries are characterized by any form of market failure. USDA has not explained why or how a bigger industry is a better industry. USDA has not explained how or whether the higher prices paid for by consumers, if the

programs do in fact work to stimulate demand (which is questionable), are transferred to the producers and handlers who fund the program. USDA doesn't know whether or not theseprograms are helpful or not, or even whether they effectuate the statutory objective. As the General Accounting Office explained:

> USDA does not have a formalized system to measure whether marketing orders are performing in accordance with the orderly marketing objectives of the AMAA. Without such criteria, USDA is not in a position to evaluate marketing order performance or to appropriately judge the merits and shortcomings of marketing orders.

General Accounting Office, "The Role of Marketing Orders in Establishing and Maintaining Orderly Marketing Conditions," at 59-60 (July 31, 1985).

The recently enacted *post hoc* "findings" cited by the Solicitor General, Pet. Br. 6 n.3, cannot possibly justify programs which, at the time, were designed allegedly to restore order to disrupted markets. They were inserted in the bill at the last minute without hearings or debate. As Senator Feingold explained:

> Are Senators aware that section 501 of this bill attempts to rewrite 35 years of legislative history with respect to commodity promotion programs in an effort to combat federal court challenges to these programs. Mr. President, that language was in neither the House nor the Senate bill and it

> has not been the subject of hearings or debates in either chamber of Congress. I want to make clear that the legislative findings in section 501 of this bill are not indicative of the views of more than a handful of farm bill conferees. Many of these findings in fact do not even make sense unless one is aware of the efforts of dissenting farmers to reform programs or are familiar with the First Amendment challenges to these programs. Indeed, Mr. President, this bill contains some very creative language intended to rewrite an already well-established history as to the purpose and intent of these programs. I think this has been a shameful process, Mr. President, irresponsible to farmers, consumers, and taxpayers, and completely inconsistent with our responsibilities to carry out a deliberative legislative process.

142 Cong. Rec. S3070 (daily ed., Mar. 28, 1996).

III.

THE GOVERNMENT HAS NOT DEMONSTRATED ANY NEED TO COMPEL SPEECH.

The government must make an especially compelling showing to justify compelling speech. This is particularly true where, as here, the speech (or silence) choices at issue has the potential for assisting individual speakers in making a profit (or avoiding a loss). As this Court has pointed out in its struggles to classify speech, *e.g.*, by motive, content, or audience, in order to establish its place in a supposed hierarchy of protection under

the First Amendment, speech motivated by a profit is more robust, more capable of independent verification, and less subject to threats and chills than speech not so blessed with the potential for reward. If collective generic speech is, in fact, better than individual speech, then the constitutional presumption must be that rational speakers will join in.

The government has been completely unable to specify a problem or a need for government intervention, especially a need compelling enough to justify the infringement on First Amendment rights. So instead, the government has focussed its ire on the so-called "problem" of "free riders," *i.e.*, those who benefit from the collective advertising program but who would not voluntarily choose to pay their "fair share" absent coercion, including huge civil and criminal fines.

This Court has never upheld a speech restriction solely because of free riders without some compelling independent basis to restrict or require speech. This so-called problem is not a problem at all, but simply the natural consequence of autonomous speakers choosing to speak differently than the orthodoxy preferred by the collective. These industries are nothing like the *Abood-Keller* line of cases dealing with unions appointed as agents for all under collective bargaining arrangements or mandatory bars. The government has not chosen to appoint a single entity to bargain with buyers on behalf of all fruit sellers. *Cf. Lehnert v. Ferris Faculty Assn.*, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part); *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 222 (1991). Nor is there at issue here the public interest in attorney discipline and in quality of legal services that underlies the requirement for participation in mandatory bars.

The government's claim that compulsion is necessary to

eliminate free riders is at best disingenuous. First, the programs at issue in this case don't do that. California fruit growers are taxed to support speech that benefits to growers in the many other states that produce these fruits. Most of USDA's programs have an abundance of free riders. For example, exemptions from the speech tax have been provided to handlers of cut flowers and cut greens with less than $750,000 in annual gross sales, 7 U.S.C. § 6801, *et seq.*; egg producers with less than 75,000 laying hens (this level having been previously raised from 3,000 to 30,000), 7 U.S.C. § 2701, *et seq.*; dairies who process less than 500,000 pounds of milk in consumer-size packages per month, 7 U.S.C. § 6401, *et seq.*; kiwi fruit producers of less than 500 pounds per year, importers of less than 10,000 pounds per year, direct sales to consumers, and production and imports for processing, 7 U.S.C. § 7461, *et seq.*; lime producers, importers, and handlers of less than 200,000 pounds per year, 7 U.S.C. § 6201, *et seq.*; fresh mushroom producers and importers of less than 500,000 pounds per year and all mushrooms for processing, 7 U.S.C. § 6101, *et seq.*; popcorn processors of less than 4 million pounds per year, 7 U.S.C. § 7481 *et seq.*; potato producers with less than five acres, 7 U.S.C. § 2611, *et seq.*; importers of raw wool, 7 U.S.C. § 7101, *et seq.*; and watermelon producers with less than ten acres and importers with less than 150,000 pounds annually, 7 U.S.C. § 4901, *et seq.*

The "free riders" in these industries were created for political, not economic, reasons. Generally, smaller producers tend to vote no in industry referenda, so they must be excluded for the programs to pass. In the egg industry, a producer vote failed an initial referendum.

The proposed sheep and wool industry promotion program provides another excellent example of the sway of politics over economics. The initial February, 1996 referendum passed by a narrow margin, but was canceled due to voting irregularities. A

new referendum will be held October 1, 1996, but only the proponent group, American Sheep Industries, was allowed by USDA to use the voter list from the terminated wool incentive program to mail out its pro-program propaganda. Imported raw wool is exempt from the speech tax, yet it will benefit from the wool promotion program. Since domestic textile mills presently use about 70% imported raw wool, this exemption is a very large "free ride" for them to carry. The reason given for the exemption, worth at least $1 million, in a recent pro-vote propaganda piece mailed by American Sheep Industries was pure politics:

> Imported raw wool is excluded from the checkoff because of the strong opposition encountered from textile interests at the time the legislation was passed. Southern senators said they would block the legislation unless it was removed.

American Sheep Industries, Inc., Checkoff Express, Summer, 1996.

The breadth of the problems with domestic promotion programs is highlighted by their expansion to imports of those products and to multiple products within the same program. Two programs that exhibit such problems are the "Cotton Program", established under the Cotton Research and Promotion Act of 1966 (the "Cotton Act"),[1] and the "Sheep and Wool Program", established under the Sheep Promotion, Research, and Information Act of 1994 (the "Sheep Act").[2] The

1. 7 U.S.C. § 2101 *et seq.*

2. 7 U.S.C. § 7101 *et seq.* Before the Sheep and Wool Program takes effect, the governing Act requires a referendum approving the Program. 7 (Cont'd)

special circumstances faced by imports of products subject to these programs demonstrate that mandatory participation in orderly marketing agreements does not further the policies underlying those programs.

One of the policies underlying generic promotion programs is that collective generic advertising expands overall consumption of the product, thus benefitting all producers.[3] In the context of these programs, "generic" has meant non-brand specific. That definition of generic advertising becomes problematic, however, when imports are added to the pool of promoted products. The problem faced by importers when they are brought under marketing orders is entrenched domestic country of origin advertising campaigns which promote, and therefore benefit, only domestic product and producers. For example, the Cotton Board, the body administering the Cotton Program, beginning in 1966 developed an advertising campaign that included the tag line "Brought to you by America's cotton growers." Initially, this campaign did not implicate the First Amendment rights of cotton imports because importers were not covered by the Cotton Program and therefore were not subject to any assessments. In 1990, however, the Cotton Act was amended to include imports of cotton within the program, and in 1992, the Department of Agriculture started collecting assessments on imports of cotton products. Notwithstanding the fact that importers of cotton products started contributing to the advertising budget of the Cotton Program in 1992, it was not until 1995 that they were

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U.S.C. § 7105(a). A referendum was held on February 6, 1996, and the Order was initially approved, but the Department of Agriculture declared the vote invalid because of procedural inconsistencies. Another vote is scheduled to take place on October 1, 1996.

3. Pet. Br. at 16.

able to force a change in the advertising campaign to reflect the contribution of imported products. Thus, for three years, importers' contributions paid for an advertising campaign that did not promote their products, but rather promoted only domestic goods over imported goods.

The drafters of the regulations implementing the Sheep and Wool Program would contend that they have eliminated the problem, faced by the cotton importers, of imports paying for promotion of domestic products, but in fact they have created another inequity in its stead. The Department's regulations provide that only domestic assessments collected under the Sheep and Wool Program may be used to fund domestic country of origin promotions; assessments collected on imported products may be used only for generic advertising.[4] This means that domestic assessments may promote "American Lamb", benefitting only domestic producers, whereas importer assessments will be used to support generic advertising, benefitting both domestic and imported products. In this fashion, domestic products benefit twice — from country specific advertising and generic advertising — whereas imports benefit only once — from generic advertising. This inequitable return on advertising dollars exists notwithstanding the fact that domestic producers pay the same assessment as the importers. A program that, by definition, disproportionately benefits a subset of a class at the expense of the remaining members of the class cannot, or, at a minimum, should not, promote the government's interest, as required by *Central Hudson*.[5]

4. 7 C.F.R. § 2180.215(a)(1).

5. *See Central Hudson*, 447 U.S. at 566. Moreover, a "generic" advertising program that disproportionately promotes domestic products over imports will, no doubt, fail the *Cal-Almond* test that the "mandatory generic advertising program sell[ ] the product more effectively than the

(Cont'd)

The second policy underpinning mandatory assessments, according to the government's brief, is prevention of "free riders" — without mandatory assessments, some could benefit from generic advertising without contributing.[6] This argument is based on the assumption that "as a matter of law advertising increases consumption of the product being advertised." *Wileman*, 58 F.3d at 1378 *citing Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico,* 478 U.S. 328, 342 (1986). Indeed, in the Federal Agricultural Improvement Reform Act of 1996 ("FAIR"), Congress specifically found that generic advertising "is intended to increase the overall demand . . . and increase the size of the market."[7] Accordingly, because the generic advertising increases the pie for everyone, everyone should contribute. This assumption, however, fails if a participant in the market is prevented from benefitting from the increased consumption. Textile imports, including those of cotton and wool products, are subject to quotas, under which import quantities are limited.[8] Thus, the core justification for generic advertising — increased demand for the product — does not apply to textile imports. The Cotton Board and the

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specific, targeted marketing efforts" of the individual. *Wileman*, 58 F.3d at 1378, quoting *Cal-Almond*, 14 F.3d at 439.

6. Pet. Br. at 27-34.

7. Section 509(b)(7), P.L. 104-127, 104th Cong., 2nd Sess., 1996; *see also* USG Brief at fn. 3.

8. 7 U.S.C. § 204, as amended. Imports are limited at an absolute number of pieces, not as a percentage of U.S. consumption. U.S. quotas on imports of wool products are particularly small, largely because of the small number of domestic wool producers. While the quotas are country-specific, as opposed to global, new entrants into the U.S. market are generally capped at levels below that of existing suppliers, thereby greatly limiting the ability of imports to increase substantially.

Sheep Board could each spend a million dollars on generic advertising, but there would be no benefit to importers so long as Congress continues to limit imports of cotton and wool products. Instead what is happening is that importers' assessments under the Cotton Program and the Sheep and Wool Program are being used to increase demand for cotton and wool products, respectively, without the possibility of any benefit from increased consumption because the quantities that may be imported are limited by another U.S. policy. Consequently, the "free-riders" chimera can not apply to importers because there is a limit on the extent to which they may "free-ride".

One of the most important aspects of speaker autonomy protected by the First Amendment is accountability. A speaker who voluntarily sends or supports a message can and must make an individualized determination that the message will be beneficial. But once the speaker's support is coerced by government mandate, the speaker (in this case a committee of competitors) need no longer be accountable to the supporter for the benefits, if any, of the message. It may be that the money is simply wasted on ineffectual messages. Or, it may be that the speech, if successful in stimulating demand, has long-run consequences contrary to the interests of the producers and handlers who are taxed to support the message. For example, producers would respond to a short-run increase in demand (price) by producing more of the commodity. This supply side response can easily overtake the increase in demand because so many producers are making individual decisions to increase production in response to higher prices. The collective advertising program cannot advertise itself off this ever-faster treadmill because each additional dollar spent yields declining marginal returns (the human stomach being finite). Professor Shepard has explained how this supply-side response can actually harm producers (the intended beneficiaries under the AMAA) in the context of another of the AMAA's regulatory

tools, shipment quotas on California-Arizona citrus to provide an orderly flow to market:

> Rising diversions [by quotas on fresh to juice] coincided with much reduced returns in the processing sector, and in the long run, appear to have eroded the overall returns to growers of the market-allocation program. In the case of *Navels*, successively lower fresh market utilization after 1960, surging shipments to the processing market, and declining average domestic returns similarly suggest that marketing order provisions that raise fresh fruit prices fail to increase overall grower returns. . . . Since farmland prices represent the capitalized value of rents, including regulatory benefits, declining orange grove prices tend to confirm the hypothesis that regulation of the California-Arizona orange industry on the basis ofenhancing short run producer returns has had a contrary long-run effect. . . . The market allocation cum price discrimination program enforced by the marketing orders thus begets long-run market responses that are hostile to the very objectives that underlie the marketing orders.

Shepard, "Cartelization of the California-Arizona Orange Industry, 1934-1981," J. Law & Econ. 83, 95, 112 (April, 1986) (simulation results demonstrated that producer returns were about 50% lower than they would have been without shipment quotas because of long-run supply response).

These long-run supply effects have already begun to show up in some of USDA's programs. For example, over the 12-year history of the flagship dairy promotion program producer returns have steadily declined to historic lows, while consumer prices have continued to climb. Beef producers are also facing chronically low prices despite ten years of aggressive promotion under that industry's checkoff program. The Beef Board's 1995 annual report explained:

> Since the early summer of 1994, however, the stakes have been changing for the beef industry, and the checkoff's limitations have become evident. Producers have learned that while the checkoff program can do many things, it cannot repeal the Law of Supply and Demand. And therein lies the essence of the industry's crisis. Currently, the U.S. cattle industry has a huge supply of beef, and, unfortunately, that supply is continuing to grow.

Beef Board Annual Report, "Changing Stakes," at 5 (1995).

IV.

THE GOVERNMENT IGNORES READILY AVAILABLE ALTERNATIVES TO COMPELLED SPEECH.

The restriction on free speech must be narrowly tailored, *i.e.*, no more restrictive than necessary to achieve the government's objective. The availability of less restrictive alternatives either dooms the programs under the fourth *Central Hudson* prong, or, preferably, these non-speech alternatives demonstrate the lack of a legitimate governmental interest under the first *Central Hudson* prong. The Ninth

Circuit correctly noted that the government could have provided a brand credit for each handler's own promotion efforts. This would have resulted in the same amount of advertising, but the overall effectiveness would have been improved because each handler could choose to join the generic campaign or perform individual efforts. Other alternatives involving a role for government but which are less burdensome of First Amendment rights include the use of general tax revenue to fund generic messages, *e.g.*, the "five a day" dietary pyramid and anti-smoking and anti-drug ads. *See Keller v. State Bar of Cal.*, 496 U.S. 1, 10-13 (1990). Or, the government could simply provide direct subsidies or tax credits to fruit farmers found by Congress to be in sufficient economic distress, as is done for many "basic" agricultural commodities.

The agricultural marketplace is replete with a rich variety of promotional alternatives to the mandated industry-wide collective generic programs. The most obvious and successful of these alternatives is the agricultural cooperative. Sunkist and Sun Maid, for example, have world renowned trademarks. They are readily able to distinguish their products in the marketplace and invest tens of millions annually in advertising despite the homogeneity of the products. Not only do Sunkist members earn a premium in the market because of the value of the Sunkist name, they also earn substantial revenue from licensing the use of that name to manufacturers of other products, *e.g.*, soda and vitamins. According to Sunkist's 1994 Annual Report, licensing income totaled over $14 million. The ability of farmers to easily differentiate their homogeneous, if not virtually identical, products in the marketplace sufficiently to justify this huge annual investment, and capture the benefits therefrom, is especially important compared to the dissimilarity and uniqueness of the fruits at issue here. Not only are nectarines, peaches, and plums obviously different from each other, there are dozens of varieties of each, with quite different colors, seasons, handling characteristics, and tastes.

Other alternatives include joining trade associations, shipping with a recognized brand name, and even federal and state-sponsored voluntary promotion programs. Indeed, major national farmer organizations have policies calling for checkoff programs to be voluntary. *See, e.g.*, Statement of National Farmers Union to the Grains Subcommittee of the U.S. House Committee on Agriculture relative to H.R. 2209, Soybean Promotion, Research, and Consumer Information Act, June 8, 1989; Statement of Doyle Rahjes for the American Farm Bureau Federation to the Subcommittee on Wheat, Soybeans, and Feed Grains of the U.S. House Committee on Agriculture, June 8, 1989. The federal programs for cotton and eggs were voluntary and were widely supported. By the time the egg program was made mandatory in 1990, only about 43% of the checkoff was requested as a refund. Here again, the main advantage of all forms of voluntary cooperation is accountability, *i.e.*, firms can join or leave depending on the ability of the program's managers to demonstrate the effectiveness and utility of the message.

The government in its brief asserts that not only are mandatory assessment necessary to prevent free-riders, but that the "benefits of collective action would be virtually impossible to achieve in the absence of mandatory assessments".[9] This argument ignores the success of cooperative programs which have functioned successfully on a voluntary basis. When the Cotton Program was first introduced, it was a voluntary "check-off" program (*i.e.*, producers not in support of the research and promotion programs could seek a refund of the assessments).[10]

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9. Pet. Br. at 27.

10. In 1990, the Cotton Act was amended to preclude such refund requests in the event that the referendum on the proposed amendments was passed. 7 U.S.C. § 2110(b), as amended Pub. L. 101-624, Title XIX,

(Cont'd)

In the last two years before the program became mandatory, more than 60 percent of all cotton producers voluntarily chose to participate.[11] Yet, even with that "limited" participation, net collections in 1989 exceeded $21.5 million, and $27.7 million in the following year.[12] Furthermore, as evidenced by the continued participation of the vast majority of cotton producers and its extension to include importers, the *voluntary* program was both successful and beneficial to the participants. A strong argument also could be made that those responsible for administering the research and promotion programs are more responsive to those being assessed when the program is voluntary than when it is mandatory, a reality with which contributors to the cotton program are now coming to grips.

Another highly successful voluntary program is the "Woolmark" program, administered by the International Wool Secretariat ("IWS") and its national representatives. Created in 1964, the Woolmark is a widely recognized international trademark, and, in fact, is one of the best known and trusted textile marks. That mark, and its "sister" mark, "Woolblend," are owned by the IWS, and administered in the United States by the Wool Bureau. The Wool Bureau licenses the mark to companies in the United States who meet strictly monitored and enforced quality standards. Currently, there are 71 licensees in the United States. Under the license, a fee is paid for the right to

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§ 1996(2). The referendum was approved in a referendum conducted July 17-26, 1991. *See* 57 Fed. Reg. 29181 (July 1, 1992).

11. In 1989, the Department of Agriculture refunded 33 percent of all assessments collected, and in 1990, refunded 36 percent. Department of Agriculture, Agricultural Marketing Service, Cotton Division, "Cotton Research and Promotion Program History of Collection".

12. *Id.*

use the mark, which fees are used to promote the use of wool, to assist wool manufacturers and retailers through technical advice, and to conduct product research and development — the same objectives described in the Sheep Act. The success of the voluntary Cotton Program and of the Woolmark belie the government argument (and FAIR's assumption) that without government guidance, individual business people will not act in their own best business interest by pooling resources with others to their mutual benefit.

Mandatory contributions for generic advertising pose another difficulty for importers of textile products that is not faced by domestic producers of cotton or wool products. In *Cal-Almond*, the Court assumed that almond growers have a finite amount of funds to use for advertising.[13] Funds that were spent, involuntarily, on generic advertising cannot be spent on other advertising efforts.[14] The harm to producers caused by such mandatory expenditures is compounded for importers. Most agricultural producers concentrate on a single fruit crop, or a small number of crops, limiting the products on which they would expend advertising dollars. Textile importers, by contrast, import a wide variety of textile products. Consequently, whereas a peach farmer, for example, can focus his advertising dollars on promoting peaches, a textile importer, by contrast, must divide his advertising budget among a wide variety of textiles both in terms of fiber — cotton, wool (including lambs wool, angora wool, Shetland wool, and cashmere wool), rayon, silk, polyester, other man-made fibers, or blends — and in terms of products — such as skirts versus dresses. Accordingly, for textile importers, not only is the issue of *how* to advertise being taken out of their hands, but the decision as to *which products* to advertise is also being usurped

13. 14 F.3d at 438-9.

14. *Id.* at 439.

by the mandatory contribution requirement of the Cotton Program and the Sheep and Wool Program.

There is yet another burden imposed on importers, but not on domestic producers, when assessments are collected on the production of a raw commodity product that is then exported, such as cotton or wool, as well as on imports of finished products using that commodity. Specifically, U.S. producers are major exporters of raw cotton which is then used to produce finished products that are then re-imported into the United States. That means that the assessment program covering both domestic and imported goods results in the double taxation of some imported cotton products. For example, the Cotton Act and accompanying regulations provide for the collection of the cotton levy on bales of domestically-produced cotton.[15] Because the regulations provide specifically that "[s]uch assessment shall be payable and collected only once on each bale," no assessment is levied on products manufactured in the United States from domestic cotton (*i.e.*, cotton clothing).[16] By contrast, the levy imposed on imports is assessed against either bales of cotton or the "bale equivalent" of "cotton in cotton containing products . . . ."[17] Because the cotton levy is collected on imported "cotton containing products", imported cotton products may be subject to a double assessment — first on the U.S.-produced cotton prior to exportation for processing, and again upon reimport as a cotton product (such as a cotton shirt or cotton trousers).[18] Thus, imported cotton products may,

15. 19 C.F.R. § 1205.510.

16. *Id.*

17. 19 C.F.R. § 1205.510(b).

18. The same problem could arise under the Sheep and Wool Program, (Cont'd)

if produced from cotton grown in the United States, be taxed twice, whereas domestically produced cotton products are taxed only once.[19]

Even more indicative of the dangers of the ever-expanding reach of domestic promotion programs under agricultural marketing programs is the inclusion of multiple products, such as has happened under the Sheep and Wool Program. Not only does this program include domestic producers and importers, who, as demonstrated above, often have different interests and goals, but it includes two significantly different products, with dissimilar interests and concerns — lamb meat and wool products.[20] Those in the lamb meat industry have no common interests with those in the textile industry — the lamb meat industry wants a sheep that grows fast and is low in fat whereas the wool industry wants a hearty sheep with a thick coat. Furthermore, there is no overlap in advertising that could promote a meat product at the same time it promotes a woolsuit. The complete lack of common interest between these two products calls into question the justification for including them in the same program and will likely undermine the efficacy of the program.

Whereas the lack of common interest might simply reduce

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but because the United States exports very little wool, the double taxation issue will not occur as frequently.

19. Whether or not the control on the quantity of imported cotton products, by means of double taxation, is a worthy purpose, such a result is not the purpose of agricultural marketing orders. Any interest in protecting the domestic cotton textile industry is within the purview of the trade laws and should not be hidden between the lines in an agricultural support program.

20. Raw wool, however, is exempted from the levy, clearly following significant pressure from domestic mills.

the effectiveness of any such program, the composition of the governing Sheep Board virtually guarantees that the interests of importers, and wool importers in particular, will be subjugated to the interests of the lamb meat domestic industry. The Sheep Act establishes a governing Board that consists of 120 members,[21] of which 95 seats are reserved for the domestic sheep industry and the remaining 25 seats are allotted to importers. This distribution of seats is grossly disproportionate to projected revenues. According to figures from the domestic sheep industry itself, imports (of both lamb meat and wool products) are projected to account for approximately 45 percent of projected revenues. Importers, however, are allocated only about 20 percent representation in the essential decision-making bodies.[22] Nor does the Sheep Act provide any mechanism for ameliorating this distortion. Unlike the Cotton Act, which provides for the reallocation of seats on the Cotton Board to reflect shifts in contributions, the Sheep Act provides no mechanism for reallocating the membership of the Sheep Board.[23] It strains credulity to believe that the Sheep Board, dominated by domestic producers, will evenly disburse dollars to encourage consumption of imported products at the expense of their own production.

One justification given by the courts in upholding

21. By comparison, the Cotton Board, with revenues exceeding $62 million, has 24 members. The Sheep and Wool Program is projected to collect only $14 million, but has 120 Board members.

22. It is ironic that the Department has noted that "the Secretary should have the latitude to appoint representatives to the Board in a manner that best reflects the interests of the various importer segments", 60 Fed. Reg. 62298, 62303 (December 5, 1995), while the composition of the Board as a whole ignores proportionate representation.

23. 7 U.S.C. § 7104(b); 60 Fed. Reg. at 62303.

mandatory assessments is that the marketing boards overseeing the generic advertising programs are themselves producers of the subject product. Thus, the Peach Board, comprising peach growers, would be well-equipped to oversee a peach promotion program. At least participants in single product programs (such as the peach program or nectarine program) can find comfort in the knowledge that those on the Board overseeing the advertising budget are knowledgeable about the industry and have a vested interest in its success. Wool importers have no such comfort. The Sheep Board is composed primarily of sheep producers who are in the lamb meat business, not the wool clothing business. Therefore, wool importers' mandatory contributions for advertising are being spent by a Board, the vast majority of whose members know nothing about the wool industry, and have no financial interest in its success. In short, the Sheep and Wool Program manifests nearly the worst example of an agricultural marketing agreement — one including diverse products with no coincidence of advertising interests, conflicting research and development needs, covering both domestically-produced products as well as imports, while the governing Board is disproportionately weighted in favor of one group's interests.

CONCLUSION

The messages at stake in this case are not those of the speakers who are forced to pay for them despite their disagreement with both the message and the messenger. They have been forced to accept the government's choice of messenger, the government's content-based preference for the type of message, and their competitors' choice of the specific messages. The Ninth Circuit was entirely correct in ruling that the speech tax at issue in this case is unconstitutional. The government was completely unable to demonstrate either that its chosen messenger, a committee of Respondents' competitors, or its content-based preference of message,

generic collective advertising versus the vast array of promotional efforts undertaken by individual firms including brand advertising, were more effective at promoting the government's albeit vague and ill-defined ends. Moreover, the speech tax was not narrowly tailored and was more restrictive than necessary to achieve the government's objective. While unquestionably the correct result, the litigation was excruciatingly painful. At first, for example, USDA refused to accept that there was even a First Amendment issue at stake. Respondents had to suffer through a lengthy exhaustion of administrative remedies process, arguably a "kangaroo court" because the Secretary (wearing his judicial hat) rarely rules against his policy choices concerning marketing orders, while facing injunctions, enforcement actions, and blatantly misleading promises regarding a refund of the tax.

Amici respectfully request that this Court simplify the process of challenging these programs by (1) clarifying that a government interest no more compelling than choosing one form of advertising over another can never be important, substantial, or compelling enough to justify forced support for the speech of others; (2) clarifying that the government must meet this high threshold burden before questions of effectiveness and the availability of less restrictive means or non-speech restrictive alternatives are examined; and (3) clarifying that wealth redistribution and the avoidance of so-called "free rider" problems can never be a sufficient government interest to justify such programs.

Respectfully submitted,

BRIAN C. LEIGHTON
Attorney for Amici Curiae
701 Pollasky Avenue
Clovis, California 93612
(209) 297-6190